APPEAL NO. 93514

On May 4, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 et seq. (Vernon Supp. 1993) (1989 Act). The hearing officer determined that (Dr. B), M.D., was not a designated doctor. The carrier asserts error in the admission of evidence concerning compliance with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE. § 130.6 (Rule 130.6) and requests that the hearing officer's decision be reversed. The claimant responds to the effect that compliance with Rule 130.6 was a sub-issue at the benefit review conference (BRC) and hearing, that it was necessary for the hearing officer to consider compliance with Rule 130.6 in order for him to determine whether Dr. B's impairment rating was "binding" on the claimant, and, accordingly, that it was not error for the hearing officer to admit evidence on compliance with Rule 130.6. The claimant requests that the hearing officer's decision be affirmed.

DECISION

The decision of the hearing officer is affirmed.

The claimant testified that he sustained an injury to his right hand at work on or about April 22, 1992. He said he has had problems with his right arm from his neck to his fingers. He has been treated by several doctors and on April 29, 1992, (Dr. W), performed a carpal tunnel release of the right hand.

In an undated Report of Medical Evaluation (TWCC-69) Dr. W certified that the claimant reached maximum medical improvement (MMI) on July 20, 1992, with a 24% whole body impairment rating. In a TWCC-69 dated November 30, 1992, Dr. B certified that the claimant reached MMI on April 22, 1992, with a five percent impairment rating. In a letter to the claimant's attorney dated May 3, 1993, (Dr. WA), stated that the claimant had not reached MMI, but estimated that the claimant had a 42% impairment rating. The claimant saw Dr. WA at his own expense.

The issue at the BRC and at the hearing was:

Whether the report from Dr. B dated November 11 (sic) 1992, giving a maximum medical improvement date of April 22, 1992, and 5 % impairment is binding.

It was the carrier's position at the hearing that Dr. B was a designated doctor mutually agreed upon by the carrier and the claimant and that Dr.'s B findings are "binding." The claimant's position was that he did not agree to see Dr. B as a designated doctor and that the Texas Workers' Compensation Commission (Commission) failed to comply with the provisions of Rule 130.6 by not notifying him that an ombudsman was available to explain the ramifications of an agreement for a designated doctor and did not confirm the purported agreement between the claimant and the carrier.

The claimant testified that he had discussions with the carrier's claims representatives, but that Dr. B's name was never mentioned in those discussions. He said that when he was calling doctors to find out which doctors did impairment ratings he found out that the carrier had set up an appointment for him to see Dr. B. He said he never agreed to see Dr. B and that he kept the appointment because he understood, from a conversation with a Commission employee, that his benefits would stop if he did not keep the appointment. He said that all he knew was that the appointment with Dr. B was "just another evaluation." In answers to interrogatories, SJ, a carrier claims representative, said that on November 10, 1992, the claimant told her he "would agree to another doctor" and that she made an appointment for him to see Dr. B. She does not say that the claimant agreed to see Dr. B, but only says that she sent a letter to the Commission informing the Commission that the carrier and the claimant had "agreed to [Dr. B]."

The claimant testified at the hearing that he did not receive any notice from the carrier that Dr. B was an agreed designated doctor nor did he receive any communication from the Commission, either written or oral, that confirmed that there was any agreement to have Dr. B be the designated doctor. Although references to compliance with Rule 130.6 are not in the BRC report, the claimant testified that he told the benefit review officer that the Commission never confirmed with him any agreement concerning Dr. B and that he was never contacted by an Ombudsman. A Notice of Refused or Disputed claim dated August 6, 1992, showed that the carrier disputed the impairment rating assigned by Dr. W and stated in the notice that it would request an "MEO" (medical examination order) to "clarify the impairment rating issue." There was no evidence that a medical examination order was ever requested by the carrier. Also in evidence was a letter from the Commission to the claimant and the carrier dated August 21, 1992, which, among other things, notified the parties that the Commission had received notice that MMI and/or impairment rating was being disputed, that the parties should attempt to mutually agree on a doctor to perform an evaluation of the claimant, and that if the parties agreed on a doctor, that doctor's findings would be adopted by the Commission.

A letter from the carrier to the Commission, with a copy to the claimant, dated November 19, 1992, stated that the claimant and the carrier agreed to Dr. B to do a "2nd opinion for impairment rating." The claimant said he never received a copy of that letter, and VU (Ms. U), a Commission Customer Assistance Representative who had examined the Commission's claim file and who had talked to the claimant about his claim, testified that the letter was not in the Commission file. Ms. U also testified that there were no records in the Commission file to indicate that there was an agreement as to a designated doctor, but also testified that there were no records to indicate that there was not an agreement as to a designated doctor. She also testified that there was nothing in the Commission file that reflected that the Commission contacted the claimant to confirm an agreement concerning a designated doctor.

A letter from Dr. B to the carrier's claims representative dated November 30, 1992 (the same date as his TWCC-69), has at the top the words "INDEPENDENT MEDICAL EVALUATION" and begins "[a]t your request, [the claimant] was evaluated by our Orthopedic Services on 11-30-92."

As previously noted, the issue at the hearing was whether Dr. B's findings on MMI and impairment rating were "binding." The issue as framed is incorrect as it relates to the certification of MMI by a designated doctor agreed to by the parties. A designated doctor's certification of MMI, whether he is agreed to by the parties or is selected by the Commission when the parties are unable to agree on a designated doctor, has "presumptive weight" under Article 8308-4.25(b) and may be overcome if the great weight of the medical evidence is contrary to the designated doctor's certification of MMI.
However, Article 8308-4.26(g) provides that if the parties agree on a designated doctor, the Commission "shall adopt" the impairment rating made by the designated doctor.

Rule 130.6 sets forth general provisions relating to designated doctors. Among other things it provides that if the Commission receives notice of a dispute over MMI or impairment rating the Commission shall notify the employee and carrier that a designated doctor will be directed to examine the employee; that after such notification is given by the Commission the Commission shall allow the claimant and the carrier ten days to agree on a designated doctor; that the Commission shall inform an unrepresented employee that an Ombudsman is available to explain the contents of the agreement for a designated doctor (the claimant in this case was not represented until January 1993, well after the date he was examined by Dr. B); that if the employee and carrier agree on a designated doctor, the carrier shall, within ten days, send a confirmation letter to the employee and Commission; and that the Commission shall contact the worker to "confirm the agreement."

In Texas Workers' Compensation Commission Appeal No. 92511, decided November 12, 1992, we held that the evidence did not support the hearing officer's finding that a certain doctor was a designated doctor agreed to by the parties, and in doing so stated:

> While an agreement on a designated doctor need not be a signed contract, Rule 130.6(c) plainly requires that any verbal agreement be memorialized in a written letter of confirmation. Moreover, the Commission's confirmation of the agreement is envisioned. Rule 130.6(d). While we can understand that there could be a situation where a clear agreement for a designated doctor is documented but the Commission is inadvertently left "out of the loop," we point out that parties who did not seek confirmation could run the risk that the trier of fact will not give effect to an agreement. Such extra safeguards were apparently deemed necessary by the Commission, because an agreed

designated doctor's report will, according to Art. 8308-4.26(g), conclusively bind the parties to the impairment rating, and prevent the Commission from considering medical evidence to the contrary.

In its request for review the carrier frames the issue to be decided on appeal as follows:

The hearing officer erred in admitting evidence regarding compliance with Rule 130.6 since the issue was not raised at the benefit review conference, nor did claimant file a statement of disputes to include this issue in response to the benefit review officer's report.

The carrier does not contend that the evidence, as admitted, does not support the hearing officer's findings of fact and conclusions of law, nor does it contend that the findings and conclusions do not support the hearing officer's decision that Dr. B was not a designated doctor.

In addressing the carrier's contention, we first point out that the transcript of the hearing does not support the carrier's assertion that it objected to the inclusion of evidence pertaining to compliance with Rule 130.6. The claimant testified without objection that he did not receive a letter from the carrier confirming the purported agreement and that the Commission did not contact him to confirm the purported agreement. Ms. U also testified without objection that the Commission's claim file did not contain the carrier's letter of November 19, 1992, that there was no record that the Commission had contacted the claimant to confirm an agreement with the carrier concerning a designated doctor, and that the Commission's file did not indicate that an agreement had, or had not, been reached. The objection in the record that the carrier has referred us to was its objection to the question to the claimant as to whether it was possible that some of the information or positions in the BRC report might be wrong. The carrier objected to that question on the basis that the claimant had had an opportunity to file a response to the BRC report, which objection was sustained. Prior to this objection the carrier had made another objection but it was directed at questions concerning whether the carrier's claims representative had told the claimant that he was recording their conversation. (The claimant said he was told his conversation with the carrier's claims representative was being recorded but when he asked the carrier for a copy of the recording the carrier said there wasn't one). It has been held that evidence which is admitted without objection can not be complained of on appeal. *See* Dicker v. Security Insurance Company, 334 S.W.d 474 (Tex. Civ. App. - Waco 1971, writ ref'd n.r.e.). *See also* Texas Workers' Compensation Commission Appeal No. 93103, decided March 22, 1993.

Considering the claimant's opening statement at the hearing wherein he referenced noncompliance with Rule 130.6 and the introduction into evidence without objection of

testimony concerning nonreceipt of the claimant's letter of November 19, 1992, and the Commission's failure to confirm the purported agreement, we are of the opinion that the record demonstrates that compliance with Rule 130.6 was litigated at the hearing as part and parcel of the framed disputed issue, and that the hearing officer was free to make findings concerning compliance with that rule. *See e.g.*, Texas Workers' Compensation Commission Appeal No. 91123, decided February 7, 1992; Texas Workers' Compensation Commission Appeal No. 92022, decided March 11, 1992.

We are also of the opinion that the matter of compliance with Rule 130.6 could properly have been found to have been raised at the BRC given the testimony of the claimant as to what was discussed at the BRC. It was not until closing argument that the carrier asserted that compliance with Rule 130.6 was not addressed at the BRC and that "that matter is waived." However, the carrier presented no testimony which contradicted the claimant's version of what matters were discussed at the BRC, but were not reported in the BRC report.

Finally, we hold that under the circumstances of this case, the issue of whether there was compliance with Rule 130.6 was subsumed in the issue of whether Dr. B's findings were "binding" (recognizing that only the impairment rating of an agreed designated doctor is to be "adopted" by the Commission and that the agreed designated doctor's finding on MMI is entitled to presumptive weight but can be overcome by the great weight of the medical evidence). In order to determine whether Dr. B's MMI certification was entitled to presumptive weight and whether his impairment rating had to be adopted by the Commission, the hearing officer necessarily had to determine whether Dr. B was an agreed designated doctor which was a factual determination. The claimant asserted that Dr. B was not an agreed designated doctor, and the carrier asserted that he was. No party contended that Dr. B was a designated doctor selected by the Commission. As we pointed out in Appeal No. 92511, supra., the Commission deemed it necessary to provide safeguards in Rule 130.6 because the agreed designated doctor's assigned impairment rating will bind the parties to that rating. We think that when there is a dispute over whether a doctor was an agreed designated doctor, with the claimant asserting that there was no agreement, evidence of the Commission's confirmation of the agreement with the claimant would be both relevant and compelling evidence, because it provides evidence of the existence of the agreement from an impartial third party who has the duty and responsibility to administer and enforce the provisions of the Texas Workers' Compensation Act. By showing that the Commission did not confirm the purported agreement, the claimant demonstrated the weakness in the carrier's evidence, and the carrier was left with attempting to prove the agreement through other means. In other words, evidence pertaining to compliance or noncompliance with the Commission confirmation provision in Rule 130.6 is relevant to the issue of whether the parties agreed on a designated doctor in that compliance with that provision would tend to show that there was an agreement whereas noncompliance would tend to show that there was not an agreement. Of course, the parties' agreement to have

a particular doctor serve as the designated doctor can be established despite a lack of evidence showing that the Commission confirmed the agreement with the claimant. *See* Texas Workers' Compensation Commission Appeal No. 92312, decided August 19, 1992, where we found that there was ample correspondence, consistent with Rule 130.6, to document the parties' agreement on a designated doctor prior to his examination, and to refute the contention that the doctor was to conduct only a required medical examination, despite the fact there was no direct evidence that the Commission confirmed the agreement as provided in Rule 130.6(d). *Compare* Texas Workers' Compensation Commission Appeal No. 93425, decided July 14, 1993.

We are not here called upon to review the sufficiency of the evidence to support the hearing officer's findings of fact or conclusions of law, nor are we asked to determine whether the hearing officer's findings and conclusions support his decision that Dr. B was not a designated doctor. We have been asked to determine whether the hearing officer erred in admitting evidence concerning compliance with Rule 130.6 and we have determined that he did not err. We do note, however, that the hearing officer found that the claimant was "involuntarily" evaluated by Dr. B and that that finding is directly contrary to any concept that the claimant "agreed" to Dr. B as the designated doctor.

The decision of the hearing officer is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge